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NO. 88-1554

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

VINCENT E. DAVIS, Petitioner,

v.

HENRY HIMMELFARB; CHARLES T. HAYS; RICHARD A. EDWARDS; GOLDEN ARROW GAS ENERGY CORPORATION; JIM KITCHENS; RONALD G. MILLER; RUTAN & TUCKER; ROBERT PIKE; EMPIRE EQUITIES; RONALD GARRETT, Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is A Single Promissory Note Secured by a Deed of Trust on a Parcel of Real Property a "Security"?

Where a party (Davis) is the owner of Mexican pesos located in Mexico and discovers through his daughter, who is an employee of a corporation, that the corporation seeks to purchase Mexican pesos; and where Davis negotiates one-on-one with the corporation, leading to a unique agreement whereby the corporation purchases from Davis $400,000 worth of pesos in exchange for a promissory note with a term of four years, secured by a deed of trust on a parcel of real property in Oregon; and where, during the negotiations, Davis declines to invest in the corporation's Mexican ventures and expresses no interest in what the corporation intends to do with the pesos; and where Davis alleges that the deed of trust he received was worth-

less because it was in third position rather than first position on the real property as the corporation had promised him; does the note, with its accompanying deed of trust, constitute a "security" as defined in the Securities Act of 1933 and the Securities Exchange Act of 1934?

2. May a District Court Dismiss Related State Law Claims After Dismissing All Federal Law Claims?

Where, in an action brought in the U.S. District Court in Oregon to foreclose on a parcel of property, one of the defendants (Davis) cross-claims against third parties claiming violation of the anti-fraud provisions of the federal securities Acts and also alleges claims under state law based on the same facts; and where the initial foreclosure action is concluded and the remainder of the action on Davis' cross-claims is transferred to the Central District of California; and where, before

trial, the District Court grants cross-defendants' motion for summary judgment on the ground that there is no "security" involved and also dismisses the related state law claims; did the District Court have discretion to dismiss the state law claims, and if so, was the dismissal an abuse of that discretion?

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STATUTES AND RULES

I. Statutes.

The statutes involved are:

Section 2(1) of the Securities Act of 1933 (15 U.S.C. 77b(1)), which states:

> When used in this subchapter, unless the context otherwise requires--
>
> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil , gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 3(a)(10) of the Securities and Exchange Act of 1934 (15 U.S.C. 78c(10)), which states::

> (a) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

II. Rules.

The Rules involved are:

F.R.C.P. Rule 13, subsections (g), (h) and (i):

> (g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.
>
> (h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of rules 19 and 20.
>
> (i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

STATEMENT OF THE CASE

Petitioner here appealed from the decision and judgment of the United States District Court for the Central District of California to the Court of Appeals for the Ninth Circuit. A copy of the District Court's Memorandum of Decision and Order (hereinafter "District Court Decision") is contained in the Appendix to the Petition; the Opinion of the Ninth Circuit Court of Appeals (hereinafter "9th Circuit Opinion") is also contained in the Appendix to the Petition. Respondent Rutan & Tucker (hereinafter "Rutan") will hereinafter refer to both lower court opinions by reference to the Petition Appendix (hereinafter "Petition App.")

The District Court Decision was rendered upon a motion for summary judgment brought by cross-defendant Himmelfarb and joined in by cross-defendants GAGE, Kitch-

ens and Miller. The motion sought dismissal of Petitioner's cross-claims against cross-defendants on the ground that no "security" was involved under federal law and therefore there was no federal question; and that further, Petitioner's related state law claims should also be dismissed. The District Court granted the motion for summary judgment.

Respondent Rutan had been served in the District Court action only shortly before Himmelfarb's motion for summary judgment was filed. Rutan filed no responsive pleadings in the District Court for the reason that the District Court's ruling on the motion for summary judgment rendered the need to do so moot.

The District Court Decision sets forth the facts relevant to the determination of the issues raised in the summary judgment motion, which are the same issues

presented in the Petition. The District Court Decision states, in conclusion:

> The foregoing shall constitute the Court's findings of fact and conclusions of law.
> (Petition App. p. 19.)

Petitioner presents two questions of law to this Court. Although he spends the first 24 pages of the Petition discussing "facts", that discussion contains largely extraneous material, and much of which contradicts the District Court's findings of fact. For purposes of determining whether to review the questions raised, the only "facts" properly before this Court are those in the District Court's findings. Those facts are as follows.

Plaintiffs [Danners and Gadan, Inc.] conveyed two parcels of property in Oregon to defendants Hays and Himmelfarb in 1981 in exchange for a deed of trust on one of the parcels. Hays and Himmelfarb conveyed to plaintiffs a security interest in prop-

erty located in Laguna California.

Defendant Hays and defendants and cross-defendants Himmelfarb, Edwards, Iseli, Kitchens and Miller are shareholders, directors or officers of cross-defendant Golden Arrow Gas Energy Corp. ("GAGE"). GAGE is an Oklahoma corporation of which cross-defendant Empire Equities, Inc. ("Empire") is a subsidiary. Edwards, Hays, Miller, Kitchens and Stepp are officers and directors of Empire.

In June, 1982, defendants Hays and Himmelfarb conveyed another security interest in the Oregon property to an Oklahoma bank. Thereafter, defendants conveyed the property to GAGE, which in turn conveyed it to Empire in exchange for an 80 percent ownership share in Empire.

Late in 1982, Empire decided to pursue investment opportunities in Mexico. To finance the investment, it decided to

obtain pesos and ran an advertisement in the Wall Street Journal soliciting pesos.

In November, 1982, cross-claimant Davis [Petitioner] learned from his daughter, an Empire employee, that Empire was looking for pesos. Davis told his daughter that he might be interested in discussing the sale of pesos. Davis' daughter introduced him to Stepp, Hays and Garrett, who offered Davis oil and gas leases in exchange for pesos. Davis declined this offer.

A number of terms were discussed and the parties ultimately agreed that Davis would transfer approximately $400,000 worth of pesos to Empire in exchange for a note for $400,000 secured by the Oregon real property. The note provided for the quarterly payment of interest to Davis at the prime rate plus one percent with the principal due in 48 months. The note in-

cluded an acceleration upon default clause. Davis claims he was led to believe he was given a first lien on the Oregon property. However, Davis' lien was subordinate to plaintiff's lien and to the bank's lien.

Plaintiffs filed this action in February, 1984 against Hays, Himmelfarb, Empire, Davis, the bank, and others in the District Court of Oregon on the basis of diversity of citizenship. They sought to foreclose their lien on the Oregon properties after defendants Hays and Himmelfarb defaulted on the payments. The court entered an order of foreclosure in August, 1985. The action was thereafter transferred to this Court.

Davis filed his initial answer and counter-claim against Himmelfarb, Hays, Edwards and Empire. With leave of Court, he later amended to add Stepp, Kitchens,

and GAGE as cross-defendants. Davis' Second Amended Cross-Claim added Iseli, Miller and Ganant as cross-defendants. The Third Amended Cross-Claim added Robert Pike and Rutan & Tucker, a law firm. . . .

Plaintiff's claims against all parties have been resolved. Davis' cross-claims are all that remain in this action. (Petition App. pp. 3-7)

* * *

. . . Davis' note was a privately negotiated transaction secured by real property. Uncontradicted testimony indicated Davis rejected other forms of structuring the deal. Particularly, Davis testified that he rejected an offer of an interest in the investment in Mexico because "I wasn't interested in the investment." (Petition App. p. 10.)

* * *

Davis' note was secured by a lien on

the Oregon real property. However, defendants reserved the right to substitute any other real property as collateral. . . . Davis alternately argues that the loan was not in fact collateralized because the lien defendants gave him was worthless.

The mere fact that Davis was deceived as to the priority of the lien does not make the transaction a security. (Petition App. p. 11.)

. . . [T]he obligation at issue appears to be a garden variety privately negotiated loan secured by real property. . . . In [Davis'] deposition testimony he unambiguously disclaimed any interest in Empire's Mexico investment and affirmed that Empire's obligation to Davis had no relationship to Empire's success or failure in that venture. (Petition App. p. 12.)

* * *

Davis notes that at the time he transferred the pesos to Empire, the corporation had a negative net worth. . . . Davis' testimony at his deposition unequivocally establishes that he looked to the collateral to secure repayment, not to Empire's entrepreneurial efforts. He characterizes the transaction as follows: "I was selling them pesos; they were buying pesos in exchange for a note. And again, what they decided to do with those pesos was their business." It is clear that Davis viewed himself as a secured creditor who would be protected even if the business failed.

* * *

As noted above, Davis' own testimony establishes that although he knew the

pesos were to be used to invest in Mexico, he did not view repayment of his note as dependent on the success of the venture. (Petition App. pp. 12-14.)

Davis claims that Empire's offer to buy pesos was part of a larger public offering. The only evidence Davis offers in support of this contention is that Empire advertised in the Wall Street Journal soliciting pesos and corresponded extensively with prospective sellers.

However, the circumstances surrounding Davis' deal with Empire belie any analogy to a public offering. Davis was put in contact with Empire through his daughter. . . .Davis conducted extensive negotiations and participated actively in determining the structure of the transaction. Moreover, it was Davis who demanded that the note be secured by a lien on real property. Additional uncontroverted tes-

timony suggests that the payment schedule on the note was set up to accommodate Davis' personal tax considerations. (Petition App. pp. 14-15.)

Based upon its findings of fact as set forth above, the District Court determined that Davis' Promissory Note and Deed of Trust did not constitute a "security" as defined in the federal securities law and granted summary judgment to the moving cross-defendants accordingly. The District Court also dismissed Davis' related state claims which were based on the same operative facts as the federal claims.

SUMMARY OF ARGUMENT

Question No. 1. Does Davis' Note and Deed of Trust Constitute a "security?"

The Petition does not raise any "special and important" question of federal law.

The decisions of the Courts of Appeals are not in conflict regarding whether a "note" is a security even though they use different analytical approaches. Under the guidelines laid down by this Court, all Circuits agree that not all "notes" are securities and that the cases must be decided in their own context and circumstances. This includes the Second Circuit. Petitioner's contention that it uses a "literal" approach as opposed to the other Circuits is contradicted by the Second Circuit's own opinion.

The Ninth Circuit's decision follows the decisions of this Court regarding

whether a note is a security, in particular Marine Bank v. Weaver. Further, Petitioner's reliance on this Court's opinion in Landreth Timber Co. v. Landreth is misplaced as that case is distinguishable on its facts because it expressly states that it is limited to "stock", as opposed to "notes."

There is no important question of federal law to settle as the decisions of this Court have already settled it.

Question No. 2: Was the District Court's Dismissal of Davis' Related State Law Claims In Error?

There is no important question of federal law to settle. The District Court had discretion to dismiss the state law claims after granting summary judgment on the ground that there was no "security" involved under federal law. The distinction between "ancillary" and

"pendent" jurisdiction is of no substance for purposes of this question according to the decisions of this Court. It is well settled that, even though a District Court has the power to hear related state claims, when the federal claim is dismissed before trial, the District Court should dismiss the state claims as well.

The District Court did not abuse its discretion by dismissing the state claims. It followed the decisions of this Court and also considered the relevant factors in making its decision.

WHY CERTIORARI SHOULD NOT BE GRANTED

I. Question No. 1: Whether Davis' Promissory Note and Deed of Trust Constitute a "Security".

A. Introduction.

Petitioner has the burden of demonstrating to this Court that there are "special and important" reasons for granting review. Supreme Court Rule No. 17.1. Petitioner seeks review of this question by contending: (1) that the Ninth Circuit's decision is in conflict with the decisions of other Circuit Courts of Appeal on this issue; (2) that the Ninth Circuit's decision is contrary to law; and (3) that this is an important question of federal law which this Court should settle. (Petition, pp. 47-48.) The Petition fails to achieve its purpose.

B. The Circuit Courts of Appeal Are Not In Conflict.

Petitioner's contention of "conflict" rests on the fact that different Circuits

have employed different analytical approaches to determine whether to characterize a "note" as a security. An examination of the cases discloses that the fundamental premises employed are the same and that various "approaches" do not constitute a conflict because the Circuits have all followed the guidelines laid down by this Court.

It is apparent that not all "notes" can be "securities." It would be impossible for it to be otherwise. "Any note", literally interpreted, would mean millions of private and small commercial loans reflected in promissory notes, every real estate loan, every I.O.U. of whatever amount and based on every conceivable transaction, would be a "security" invoking the jurisdiction of the federal courts. This Court has established guidelines for the lower federal courts which

establish operative limits on the broad statutory definitions.

> The definition of "security" in the Securities Exchange Act of 1934 is quite broad. . . .
>
> The broad statutory definition is preceded, however, by the statement that the terms mentioned are not to be considered securities if "the context otherwise requires. . . ." Moreover, we are satisfied that Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud. Great Western Bank & Trust v. Kotz, 532 F.2d 1252, 1253 (CA9 1976); Bella v. First National Bank, 495 F.2d 1109, 1114 (CA5 1974).

Marine Bank v. Weaver, 455 U.S. 551, 555-556 (1982).

In Marine Bank, this Court held that a bank certificate of deposit and a related pledge agreement were not "securities."

> . . . The definition of "security" in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires.
>
> * * *

> Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world.
>
> (455 U.S. at 558-559.)
>
> . . . Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.
>
> (455 U.S. at 560, n. 11.)

It must be, and is, recognized that the factual circumstances in which notes may be involved are too numerous and varied to allow for a precise and concrete rule for determining which notes are and which are not securities. Each case must be decided in its own context. The Courts of Appeal have followed the lead provided by this Court in such cases as United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 849, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975):

> Because securities transactions are economic in character Congress intended the applications of these statutes to turn on the economic realities underlying a transaction and not on the name appended thereto.

In Great Western Bank & Trust v. Kotz, 532 F.2d 1252, 1256 (CA9 1976), it was observed:

> The courts of appeals have followed this "economic realities" approach in holding that these statutory definitions should not be taken literally and that not all "notes" are securities: . . .

The Kotz decision cites examples from the Second, Third, Fifth and Seventh Circuits for this proposition.

Petitioner's claim of conflict in Court of Appeal decisions rests mainly on the claim that the Second Circuit has taken a "literal" approach, rejecting the "functional" approaches of the other Circuits and citing Exchange National Bank of Chicago v. Touche Ross & Co., 544 F.2d

1126 (CA2 1976) for the proposition. But, the Second Circuit disagrees that it uses a literal approach as it makes clear in Chemical Bank v. Arthur Anderson & Co., 726 F.2d 930, 938 (CA2 1984), Cert. den. 469 U.S. 884, where the court held that notes evidencing loans by banks to a business borrower were not securities.

The Second Circuit's approach in both cases is that the person asserting that the note in question is not a "security" has the burden of showing that "the context otherwise requires." In Exchange National Bank it had listed a number of examples of cases where the context did otherwise require, e.g., "a note secured by a mortgage on a home", and stated that a note which bore a "strong family resemblance" to the examples listed would not be considered a security. (544 F.2d at 1138.) In Chemical Bank, the Second Cir-

cuit stated that it was not overruling its earlier approach, but simply adding the type of notes involved there to its list. (726 F.2d at 939.)

Importantly, the Second circuit in Chemical Bank gave substantial consideration to this Court's opinion in Marine Bank, supra. In particular, it was guided by this Court's statement that Congress did not intend to provide a broad federal remedy for fraud and by this Court's approving reference to Judge Wright's concurring opinion in Great Western Bank v. Kotz, 532 F.2d 1252 (CA9 1976) which had noted that an unsecured note, the terms of which were negotiated face-to-face, given to a bank in return for a business loan, is not a security. (726 F.2d at 938.)

Petitioner has not shown that any conflict exists in the decisions of the Courts of Appeal on the question of

whether a "note" is a "security". All of them exclude some notes, when the context otherwise requires. Since it is impossible to anticipate every possible permutation of note, circumstance and context, the lower courts must rely on the broad statutory language and this Court's guidelines. Petitioner has not demonstrated that any of the Courts of Appeal have failed to do that in developing their own "approaches" to deciding the unique cases which confront them.

C. The Court of Appeals' Decision Follows Applicable Decisions of This Court.

Petitioner's contention that the Court of Appeals' decision conflicts with applicable decisions of this Court is substantially answered in the preceding section. In particular, this Court's decision in Marine Bank is the most applicable. In that case, Plaintiffs purchased a

$50,000 certificate of deposit from the bank and later pledged it to the bank to guarantee a loan to a corporation, Columbus Packing Co. In consideration for the pledge, Plaintiffs were to receive 50% of Columbus net profits and $100 per month as well as use of certain of Columbus' property during the term of the pledge. This Court held that neither the certificate of deposit nor the pledge agreement was a security. With regard to the latter, the Court stated:

> . . .The unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors, not a private transaction as in this case. . . . The instruments involved in C.M. Joiner and Howey had equivalent values and could have been traded publicly.
>
> Here, in contrast, the Piccirillos distributed no prospectus to the Weavers or to other potential investors, and the unique agreement they negotiated was not designed to be traded publicly. . . . Accordingly, we hold that this unique

> agreement, negotiated one-on-one by the parties, is not a security.
>
> (455 U.S. at 560)

In the instant case, there was no public offering and no prospectus offered to Davis or any other person. Empire was in the market for pesos and Davis had pesos for sale. The parties negotiated one-on-one, eventually arriving at a unique agreement on terms substantially dictated by Davis' requirements. Davis had no interest whatever in investing in Empire's projects nor in what Empire intended to do with the pesos it acquired from him. Considering the decision in Marine Bank, the Court of Appeal had no choice but to uphold the District Court decision that Davis' promissory note and deed of trust were not a security.

Petitioner's reliance on Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) does not change anything. The

issue there was whether the sale of 100% of the stock of a company was excluded from the anti-fraud provisions of the securities laws as some Courts of Appeal had held. This Court held that the transaction was the sale of "securities", observing that stock was unique among all the items listed in the statutory definition of "security":

> Although we do not decide whether coverage of notes or other instruments may be provable by their name and characteristics, we do point out several reasons why we think stock may be distinguishable from most if not all of the other categories listed in the Acts' definition.
>
> Instruments that bear both the name and all of the usual characteristics of stock seem to us to be the clearest case for coverage by the plain language of the definition.
>
> * * *
>
> . . . We here expressly leave until another day the question whether "notes" or "bonds" or some other category of instrument listed in the definition might be shown "by proving [only] the document itself." SEC v. C.M. Joiner Leasing Corp., supra, at

> 355. We hold only that "stock" may be viewed as being in a category by itself for purposes of interpreting the scope of the Acts' definition of "security."

(471 U.S. at 693-694.)

There is absolutely nothing in Landreth with which the Court of Appeals decision conflicts. Not only are the two cases completely distinguishable on their facts, this Court expressly stated that it was not dealing with the term "notes" under the securities laws, thus limiting the decision to the case of stock.

D. There is No Important Question of Federal Law For This Court to Settle

Petitioner has made no showing that this Court should be interested in taking this case for the purpose of settling an important question of federal law. The law is probably as clear as the lower courts and this Court can make it with respect to "notes." This Court has established clear working guidelines consistent

with the text and the purposes of the securities Acts. The lower courts have followed those guidelines in the many and varied contexts in which "notes" are used by businesses and individuals. As this Court stated in Marine Bank:

> . . . Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.
>
> (455 U.S. at 560, n. 11.)

This Court has already settled the question about as well as it can be in a complex world where decisions are made by fallible human beings. The fact that this Court declined to review the Second Circuit's decision in Chemical Bank, supra, is some indication that the question is already well settled.

II. Question No. 2: Was the District Court's Dismissal of Davis' Related State Law Claims In Error?

A. Introduction.

Petitioner seeks review of this question by contending: (1) that this is an important question of federal law which this Court should settle, and (2) the District Court abused its discretion in dismissing Petitioner's state law claims after a successful summary judgment motion removed his federal law claim from the action. (Petition, pp. 61-62.) The Petition fails to achieve its purpose.

B. There is No Important Federal Question for This Court to Settle.

Petitioner seeks to make a simple issue complicated. There was never any question that the Oregon District Court had diversity jurisdiction in the original action and ancillary jurisdiction over Davis' cross-claims and the cross-defendants he sued. After the original

plaintiffs' action was reduced to judgment in Oregon in 1985 and the case was transferred to the Central District of California, Davis was in the position of a Plaintiff with a federal securities Act claim and state law claims based on the same facts. Before trial, certain cross-defendants moved for summary judgment. District Court Judge Kelleher granted the motion, and, because the securities Act claim was thereby removed, also dismissed the related state law claims.

The simple question is whether the District Court was obligated by law to retain Davis' state law claims. The simple answer is: No.

The distinction between "ancillary" and "pendent" claims for this purpose is of no consequence, even though Petitioner belabors the point. In Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370

(1978), this Court made it clear that the labels indicate a difference of no substance:

> . . . Gibbs and this case are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?

The leading cases in this area involve the jurisdictional power of the federal courts to hear matters arising under state law when connected to federal law claims. Even in cases where they have it, the courts have been reluctant to exercise that power and the clear rule is that state law claims should be dismissed where the federal claim is removed from the case, particularly if this occurs before trial. The leading case is United Mine Workers v. Gibbs, 383 U.S. 715 (1966):

> . . . It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. . . . Certainly,

> if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to sate tribunals. . . .
>
> The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. . . . [R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect on a state law case. Once it appears that a state claim constitutes the real body of the case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.

(383 U.S. at 726-727; emphasis supplied.)

In the portion of the foregoing passage stating that the state claims should be dismissed when the federal claim is dismissed before trial, the Court, in a foot-

note, cites a Ninth Circuit case, Wham-O-Mfg. v. Paradise Mfg. Co., 327 F.2d 748 (CA9 1964), for the proposition.

Wham-O-Mfg. is on all fours with the instant case. It involved a federal patent infringement claim to which was appended a state law unfair competition claim. A pre-trial motion for summary judgment disposed of the patent infringement claim and the District Court dismissed the state law claim. The Ninth Circuit Court of Appeals stated:

> And in the case before us, although we are satisfied the district court did have jurisdiction over the non-federal subject matter, we believe that on the this record the court, in the exercise of a sound discretion, had no choice but to dismiss the complaint with respect to that claim.
>
> (327 F.2d at 753.)

Petitioner's contention that the District Court was somehow obligated to retain jurisdiction of the state law

claims after disposal of the federal claims has no support in the well settled and controlling case law. Indeed, his position is clearly contrary to the law. Petitioner contends that F.R.C.P rule 13(i) compels the result he desires. (Petition, p. 61.) But the Rule is clearly permissive, not compulsory. Petitioner has attempted to create an issue to engage the curiosity of this Court where there is no such issue. Nothing here remotely approaches being "an important issue of federal law which has not been, but should be, settled by this Court."

C. There was No Abuse of Discretion.

Petitioner contends that so much pre-trial discovery and preparation had occurred before the action was dismissed, that the dismissal should be deemed an abuse of discretion. (Petition, p. 62.) This contention is disposed of by the dis-

cussion and authorities cited in the preceding section. Further, as the Court of Appeals observed, the District Court gave due consideration to the relevant factors of judicial economy and fairness. (Petition App., p. 58-59.) The record here contains not a hint that either the District Court or the Court of Appeals abused its discretion.

CONCLUSION

Petitioner has given this Court no "special and important reasons" to review the decision of the Court of Appeals or the District Court. Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF STUART T. WALDRIP,
A PROFESSIONAL CORPORATION

STUART T. WALDRIP

By: _____
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